IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 12458 of 2001

For Approval and Signature:

HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

I O C LTD

Versus

UNION OF INDIA

Appearance:

1. Special Civil Application No. 12458 of 2001
MR BHARAT T RAO for Petitioner No. 1
MR DN PATEL for Respondent No. 1-2

CORAM : HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE A.M.KAPADIA

Date of decision: 13/02/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE M.S.SHAH)

What is challenged in this petition under Article 226 of the Constitution is the judgment and order dated

23.3.2001 of the Customs Excise & Gold (Control) Appellate Tribunal, New Delhi in Appeal No.E-2628/99-C in so far as the Tribunal only partly allowed the petitioner's appeal to the extent of setting aside penalty of Rs.13,90,86,359/- levied by the Assessing authority on petitioner -Indian Oil Corporation Ltd..

2. In view of the fact that this Court proposes to pass an order of remand to the Tribunal, it is not necessary to set out all the facts in detail. Suffice it to state that by order dated 25.8.1999, the Commissioner of Central Excise levied central excise duty to the tune of Rs.14,36,74,091/- and an identical sum was directed to be paid by way of penalty under Section 11AC of the Central Excise Act read with Rule 173Q(1) of the Rules. Interest at the rate of 20% per annum was also levied.

3. The petitioner-Indian Oil Corporation, a public sector undertaking, had paid the entire amount of excise duty by the time the appeal reached hearing before the Tribunal. The Court is also informed that the petitioner also paid the entire amount of interest levied on the said excise duty. Hence, the challenge before the Tribunal was confined to the propriety of imposition of penalty levied under Section 11AC of the Act. Since the petitioner is a public sector undertaking and was litigating against the Union of India, the case was examined by the Committee on Disputes and the Committee noted that since the petitioner had paid the differential duty and was only contesting imposition of fine and interest relatable to the differential duty payable, the Committee permitted the petitioner to pursue its appeal before the Tribunal. Since interest was already paid before the appeal reached hearing, the Tribunal confined its attention to the legality of the penalty imposed by the impugned order of the Commissioner.

The Tribunal noticed that the duty demanded from the petitioner related to the period from April 1994 to September 1998 and that period was required to be divided into two parties -

Period	Amount of penalty (Rs.)
(i) April 1994 to 27.9.1996	13,90,86,359/-
(ii) 28.9.1996 to September, 1998	45,87,732/-

The Tribunal also noticed that since Section 11AC under which the penalty was imposed was inserted with effect from 28.9.1996, the penalty for the period from 1994 to

27.9.1996 to the tune of Rs.13,90,86,359/- could not have been levied under Section 11AC and accordingly, the Tribunal set aside that penalty relying on the decision of the Apex Court in CCE, Coimbatore vs. Elgi Equipments Ltd., (2001) 128 ELT 52. The Tribunal thereafter gave the following reasons for upholding the penalty of Rs.45,87,732/-:-

(i) Taking note of the total amount of duty evaded, namely, more than Rs.14 crores imposition of penalty of Rs.45,87,732/- cannot be considered as unconscionable or too harsh;

(ii) The attempt of the assessee to show that there was no evasion of duty disentitling claim of Modvat under Rule 57E was not examined on the ground that the Committee on Disputes had permitted only challenge to the legality of penalty and not legality of imposition of duty.

The petitioner has, therefore, filed the present petition under Article 226 of the Constitution challenging the order of the Tribunal.

4. Mr BT Rao, learned counsel for the petitioner has submitted that the Tribunal having set aside the penalty of Rs.13,90,86,359/- on the ground that it pertained to the period prior to 28.9.1996 when Section 11AC was inserted, the Tribunal erred in not considering the fact that Rs.13,90,86,359/- penalty was levied corresponding to the excise duty of Rs.13.90 crores for the period prior to 28.9.1996. Once the penalty for that period prior to 28.9.1996 was set aside, the excise duty payable for the period prior to 28.9.1996 was not required to be taken into account for examining the proportionality of the penalty vis-a-vis the duty payable after 28.9.1996.

Secondly, it is submitted that even though the penalty of Rs.45,87,732/- is upheld under Section 11AC, the penalty could not have been upheld without going into the question whether the short levy was "by reasons of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty". It is submitted that it was for this limited purpose that the petitioner's representative before the Tribunal had urged that there was no evasion of duty disentitling claim of Modvat under Rule 57E of the Modvat Rules.

5. On the other hand, Mr DN Patel, learned Senior

Standing Counsel for the Central Government has submitted that since the Tribunal has upheld penalty of only Rs.45,87,732/-, which is less than 4% of the excise duty which was initially disputed by the petitioner and not paid before filing of the appeal, the Tribunal was justified in upholding the penalty on the ground that it was not unconscionable or too harsh to warrant interference of the Tribunal.

As regards the second contention, it is submitted that since the Committee on Disputes had permitted the petitioner to challenge only the penalty levied by the impugned order and not the excise duty, it was not open to the petitioner to urge any contention which would have any bearing on the question of payment or non-payment of excise duty.

6. Having heard the learned counsel for the parties, there appears to be some substance in the first contention, but we express no final opinion on the said contention because we propose to remand the matter to the Tribunal, in respect of the second contention as well.

7. While imposing penalty, the Assessing authority and the Tribunal are certainly required to go into the question whether the short levy was by reasons of -

(i) fraud, collusion or any wilful mis-statement or suppression of facts or

(ii) contravention of any of the provisions of the Act or of the rules made thereunder with intent to evade payment of duty.

This would require the Assessing authority or the Tribunal to go into the question of mens rea or guilty mind. The first part of the inquiry - fraud, collusion or wilful mis-statement or suppression of facts - would involve more of factual investigation and entails higher penalty because the degree of culpability is higher here. The second part of the inquiry may ordinarily involve more of a legal debate. If the interpretation placed by the assessee on a particular statutory provision or on a technical aspect having a bearing on the tax liability is perverse, the intent to evade payment of duty may be readily inferred, but if the interpretation placed by the assessee is a plausible one and not unreasonable, the authority will be slow in imposing penalty in the first place and if penalty is to be imposed, for determining the quantum of penalty also the authority will look into the question of bonafides. In Hindustan Steel Ltd. vs.

State of Orissa, AIR 1970 SC 253, the Apex Court held that penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligation. Hence, in this sense it would be necessary for the Assessing authority or the Tribunal to consider before imposing or upholding penalty, whether the assessee's case regarding its/his duty liability was bonafide, even if it was not accepted on merits. If the assessee's interpretation of a statutory provision or a technical matter (having a bearing on the tax liability) is not accepted and the departmental authorities levy duty and penalty, when the Tribunal considers whether to uphold or set aside the penalty, the assessee can show its/his bonafides by pointing out that it/he has paid up, may be with or without protest, the duty without penalty after the adjudication by the Departmental authorities.

8. In the instant case, the assessee's representative could not, therefore, have been prevented from urging that there was no intent to evade payment of duty disentitling claim of Modvat under Rule 57E of the Rules. Since the assessee had already paid up the duty without protest, what the assessee was attempting to do was not to invite any adjudication regarding the duty liability but only to show that the assessee's perception of its claim for entitlement of Modvat under Rule 57E was bonafide. If such perception could be shown as bonafide, though found to be erroneous on merits, coupled with the fact that the assessee did pay up the duty and interest before the appeal reached hearing, the assessee would be justified in contending that there was no intent to evade payment of duty. It is not at all the case of the respondent authorities that there was fraud, collusion or wilful mis-statement or suppression of facts on the part of the petitioner which had resulted into short payment of duty.

We are, therefore, of the view that the Tribunal committed an error apparent on the face of the record in not exercising its jurisdiction in the matter of examining the petitioner's challenge to the levy of penalty and the quantum of penalty merely on the ground that the assessee was not permitted by the Committee on Disputes to challenge the differential excise duty because the assessee had already paid the differential excise duty. In our view, when the Committee on Disputes permitted the assessee to challenge the imposition of penalty, the Tribunal could not have prevented the assessee from urging all available contentions to show

that there was no fraud, collusion or any wilful mis-statement or suppression of facts and that even if there was any contravention of any of the provisions of the Act or the Rules, it was not done with intent to evade payment of duty.

9. In view of the above discussion, we quash and set aside the judgment and order dated 23.3.2001 in so far as the Tribunal has upheld the imposition of penalty to the tune of Rs.45,87,732/- and remand the matter back to the Tribunal to hear and decide that part of the appeal afresh in accordance with law and in light of the observations made hereinabove in this judgment.

We clarify that we are not disturbing that part of the Tribunal's judgment by which the Tribunal set aside the penalty to the tune of Rs.13,90,86,359/relatable to the period prior to 28.9.1996.

Rule is made absolute to the aforesaid extent with no order as to costs.

(M.S. SHAH, J.) (A.M.KAPADIA,J.)

zgs/-